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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COUNTRYWIDE HOME LOANS, INC. et al., Plaintiffs and Appellants, v. MRA FUNDING CORPORATION et al., Defendants and Respondents.	B207967 (Los Angeles County Super. Ct. No. BC380161)

APPEAL from an order of the Superior Court for the County of Los Angeles. Yvette M. Palazuelos, Judge. Appeal dismissed.

Cunningham & Treadwell, James H. Treadwell and Jonathan L. Fong for Plaintiffs and Appellants.

Chang & Coté and Steven J. Coté for Defendants and Respondents.

SUMMARY

This is an appeal from an order dissolving a preliminary injunction. The injunction had prevented the holder of a deed of trust on certain real property from proceeding with a nonjudicial foreclosure sale of the property. As a result of the order dissolving the injunction, the holder of the deed of trust was free to proceed with the foreclosure sale, and the foreclosure sale occurred about six weeks after this appeal was filed. Because the act sought to be enjoined -- the foreclosure sale -- has already occurred, the appeal from the order dissolving the preliminary injunction is moot. Accordingly, the appeal is dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

Countrywide Home Loans, Inc., and Flora and Luis Rosales (Rosales) filed a complaint against MRA Funding Corporation and SBS Trust Deed Network (collectively MRA) for declaratory relief and to quiet title to an apartment building that Rosales had purchased from Landsafe Properties. Rosales purchased the property (and Countrywide lent them the purchase money) without knowledge that Landsafe had encumbered the property with a deed of trust, recorded a few weeks earlier, of which MRA Funding Corporation was the beneficiary. When obligations secured by MRA's deed of trust were not paid, MRA began nonjudicial foreclosure proceedings.

Countrywide and Rosales filed their complaint on November 2, 2007. In addition to seeking declaratory relief and to quiet title, Countrywide and Rosales alleged causes of action for slander of title, cancellation of instruments, and injunctive relief restraining MRA from foreclosing on the property. The principal basis for the lawsuit was the claim that, over a year after Rosales purchased the property, a substantial modification of the promissory note underlying the MRA deed of trust was negotiated, increasing the principal and otherwise substantially altering the terms of the original promissory note, thus causing MRA to lose any priority position it may have had with respect to its claimed lien on the property.

Two weeks after filing suit, Countrywide and Rosales (collectively "Countrywide") sought a preliminary injunction enjoining MRA from "the sale or

attempted sale, by foreclosure sale or otherwise" of the property. In addition to asserting that MRA had lost any priority position it may have had, Countrywide presented evidence that the amount MRA claimed was in default was incorrect for a number of reasons. Countrywide contended it would suffer irreparable harm if Rosales' ownership rights and Countrywide's deed of trust were extinguished at the foreclosure sale, and that it had shown a likelihood of prevailing on the merits of its claims.

MRA's opposition contended that the amendment to the promissory note underlying its deed of trust made no material change, but actually decreased the amount due under the original note; MRA claimed the only real differences were a reduction in the monthly payments and a formal option to extend the loan for five months (and that the extension fees were provided for in the original note). The amendment also allowed MRA to pay off a senior lien holder to prevent a foreclosure sale, but MRA claimed its deed of trust already gave it that right.

As for the amount in default, MRA described various accountings that had been made in correspondence with Countrywide's counsel. These accountings showed different amounts from that stated in the notice of trustee's sale, and were complicated, in part, by the receipt of funds from the sale of another property (the 77th Street property) which had also served as security for the promissory note to MRA;[1] the second accounting purported to show that MRA had understated the new balance after sale of the 77th Street property by some $44,000.

On December 13, 2007, the trial court granted Countrywide's motion for a preliminary injunction until February 1, 2008, and set that date for a further hearing.[2]

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[1] MRA's deed of trust covered four properties in addition to the Rosales property; the other three had been sold previously, and the 77th Street property was sold in foreclosure proceedings initiated with the same notice of default as the Rosales property.

[2] On December 10, 2007, Countrywide filed a notice of lis pendens with respect to the subject property.

The court stated that the core of the dispute was whether Countrywide could show a reasonable probability of success on the merits:

> "There is no dispute that MRA's lien was created before Countrywide's. [Countrywide] argue[s] that the MRA's lien lost its senior status by making an amendment that increased the amount due. The amendment was a payment used to payoff another loan on one of the four properties. While this increased the amount owed, [Countrywide has] failed to show how it was an impermissible amendment. Thus, MRA's lien appears to be senior."

The court concluded, however, that the amount alleged to be currently owed was uncertain, and the uncertainty "warrants postponing the foreclosure sale until a concrete payoff amount is determined."[3]

On February 1, 2008, the trial court granted Countrywide's motion for a preliminary injunction "until the Notice of Default has been cured." The court observed that the amount in the Notice of Default ($831,774.87) was "much greater than the amount currently alleged to be owed" ($553,096.16), and this difference rendered the notice of default ineffective. The court again rejected Countrywide's argument that there had been substantial changes in the note secured by MRA's deed of trust, observing that it had "dismissed this argument in the context of a payoff of a senior lien holder" at the previous hearing, and that the changes in payment dates and amounts in the amended note "are minor and seem to favor [Countrywide and Rosales] on the whole." The court concluded that it would "lift the injunction when the Notice of Default is cured because [Countrywide and Rosales] have not shown a probability of success on the merits as to why MRA should not be paid." ~CT 256)~

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[3] The court ordered further briefing with supporting evidence "regarding the issues of (1) the amount owed under the obligation and (2) the issuance of injunctive relief against a foreclosure sale when the amount owed is disputed." At the hearing, at Countrywide's request, the court's briefing order was supplemented to include briefing on the question of whether the amendment created a new note.

On February 13, 2008, MRA filed an answer to Countrywide's complaint, and seven weeks later, MRA moved to terminate the preliminary injunction of MRA's foreclosure sale. MRA reported that on February 20, 2008, a new notice of default was recorded, stating the correct amount due ($554,848.36 as of February 6, 2008). Countrywide opposed the motion, continuing to argue that the amendment to the promissory note rendered MRA's lien unenforceable.[4] On May 7, 2008, the trial court granted MRA's motion and lifted the preliminary injunction, finding that MRA had previously provided briefing outlining its computation of the amount owed, and Countrywide had not shown that the accounting did not comport with the terms prescribed in the promissory note. The court concluded that Countrywide had "not shown a probability of success on the merits as to why they should not pay the amount MRA claims is currently owed," so the preliminary injunction of the foreclosure sale was lifted "per this Court's February 1, 2008 ruling." At the same hearing, the trial court set a December 8, 2008 trial date.

On May 16, 2008, Countrywide filed a notice of appeal from the trial court's order. (Code Civ. Proc., § 904.1, subd. (a)(6) [appeal may be taken from an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction].)

DISCUSSION

Countrywide contends on appeal that the preliminary injunction preventing the foreclosure sale "should have continued in effect pending a full determination of the matter on the merits," and asks this court to reverse the trial court's order and reinstate the preliminary injunction. The appellate record indicates, however, that the foreclosure

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[4] Countrywide also argued that the new notice of default was defective. Its rationale was that the previous notice of default was admittedly defective (for having stated an incorrect amount), and so the sale of the 77th Street property -- which also secured the promissory note, and the sale of which was conducted pursuant to the same incorrect notice of default -- was "void" (thus rendering the payoff amount in the new notice of default uncertain).

sale took place on or about July 1, 2008, some six weeks after Countrywide filed its notice of appeal. (See Appellant's Petition for Writ of Supersedeas filed July 17, 2008, and this court's order of July 18, 2008, denying the petition.) Consequently, this court permitted the parties to file supplemental letter briefs as to why the appeal should not be dismissed as moot. We conclude the appeal is moot and must be dismissed.

It is well settled that ["[i]f the lower court refuses to restrain the defendant from doing a particular act, and pending the plaintiff's appeal the defendant does it, an appeal solely from the order denying the injunction is rendered moot." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 752, p. 818, citing cases.) Thus, in a case involving efforts to enjoin a recall election, an appeal was dismissed as moot where the election had already been held:

> "[W]hen the event which it was sought to enjoin, that is, the election, had taken place, the remedies of the plaintiffs were removed from the field of injunctive relief and were relegated to such remedies, if any, as they might have and avail themselves of subsequent to the election. *Certainly they may not, after the election has been held, still urge a court to stop it*." (*Lenahan v. City of Los Angeles* (1939) 14 Cal.2d 128, 132, italics added.)

The court in *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1 reached the same result. (*Id.* at p. 10 [appeal from an order denying preliminary injunction of an election "must be deemed moot and be dismissed"; "the appellate court cannot render opinions '". . . upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it'"'"]; cf. *County of Los Angeles v. Butcher* (1957) 155 Cal.App.2d 744, 746 ["[w]hether an injunction restraining the sale of real property should be granted becomes a moot question on appeal where in the meantime the property has been sold"].)

Countrywide urges in its supplemental brief that the case is not moot because "the issue of title to real property is still squarely before the court since . . . MRA . . . claims to hold title following the foreclosure sale." But the issue of title is *not* before the court of appeal.

The only issue before us is whether the court erred in dissolving a temporary injunction, a decision that involved a determination whether Countrywide showed a probability of success on the merits of the underlying complaint. As the court observed in *Jomicra, Inc. v. California Mobile Home Dealers Assn.* (1970) 12 Cal.App.3d 396, "[e]ven if events and the passage of time had not rendered injunctive relief inappropriate and ineffective, this court could not properly write a definitive opinion upon the merits of the controversy between the parties on an appeal from an order granting or denying a preliminary injunction," as """[t]he granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or should not be restrained from exercising the rights claimed by him. Indeed, when the cause is finally tried it may be found that the facts require a decision against the party prevailing on the preliminary application."""" (*Id.* at pp. 400-401.)

Countrywide points to *Bisno v. Sax* (1959) 175 Cal.App.2d 714, in which the court of appeal reversed a judgment after trial, in an action to enjoin a trustee's sale and for declaratory relief, in which the trial court had dissolved a preliminary injunction of the sale. After entry of judgment, the foreclosure sale proceeded and the plaintiffs appealed. The court of appeal rejected the contention that the appeal should be dismissed as moot because of the foreclosure sale. (*Id.* at pp. 730-731.)

In *Bisno v. Sax*, *supra*, 75 Cal.App.2d 714, there had been a trial on the merits, *after* which judgment was entered dissolving the preliminary injunction, and an appeal was taken from that judgment. (*Id.* at p. 720.) In short, the merits of the claim had been decided by the trial court. Indeed the court of appeal observed that the precedents -- to the effect that an appeal from an order denying a temporary injunction would not be entertained after the act sought to be enjoined has been performed -- "seem applicable to the injunction feature of the instant action, but they have no application to the declaratory features of the complaint." (*Id.* at p. 731.) The court then found that the trial court should have concluded and declared that all defaults under the trust deed had been

cured.[5] (*Ibid.*) Here, unlike the case in *Bisno v. Sax*, the merits of Countrywide's complaint for declaratory relief and to quiet title have not been decided by the trial court, and the only issue before us is whether a preliminary injunction of an event which has already occurred -- the foreclosure sale -- should be reinstated. The appeal is plainly moot and must be dismissed. Our disposition today is not intended to reflect any opinion on the merits of the appellants' declaratory relief and quiet title claims.

DISPOSITION

The appeal is dismissed. MRA Funding Corporation is to recover its costs on appeal.

BENDIX, J.[*]

We concur:

RUBIN, Acting P.J.

BIGELOW, J.

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[5] The court further rejected the claim that reversal of the judgment could not affect title to the property, which had passed to a third party at the foreclosure sale, because the third-party purchaser had purchased in the face of a recorded lis pendens and with actual knowledge of the lawsuit on appeal. (*Bisno v. Sax*, *supra*, 175 Cal.App.2d at p. 731-733, citing *Di Nola v. Allison* (1904) 143 Cal. 106, 114 [purchaser at foreclosure sale was on notice that validity of title was disputed on appeal and his title would be defeated by reversal of the judgment].)

[*] Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.